No. 80-1107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM CAULFIELD, *et al.*,

Petitioners,

—v.—

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FILED IN BEHALF OF RESPONDENT RONALD ROSS.

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QUESTIONS PRESENTED

In the argument set forth infra pp. 21-39 respondents explain why this case presents no issue over which the Court should extend its discretionary review. It is respondents' position that the questions presented for review are without legal merit and that the questions, as framed by the petitioners, assume facts that are plainly at odds with the record in this case.

Because the questions, as framed by the petitioners, are inconsistent with the record, respondents have recast petitioners' questions to more accurately reflect the reality of the instant record. Even, in their recast form, respondents believe that the issues generated do not warrant review by this Court, as petitioners' position remains without merit.

Nevertheless, to comport with the record in this case petitioners' questions must be

recast as follows:

1. Where, as the courts below found, a Board of Education's racially discriminatory teacher appointment and assignment practices have an injurious effect upon the school-children's educational environment, and where the available data suggests that a primary purpose of federal funding to a school system is devoted to employment, does 42 U.S.C. 2000d-3 bar the Office for Civil Rights from investigating and attempting to correct such discriminatory practices?

2. Did the courts below err in concluding that the Office for Civil Rights reasonably identified and reasonably sought to remedy violations of Title VI that it and the Board of Education thought in need of remediation?

3. Where, as here, the Board of Education collected ethnic data, pursuant

to the mandate and to effectuate the purposes of Title VI and Title VII of the 1964 Civil Rights Act, were the instant petitioners deprived of any constitutional rights of privacy, liberty or due process?

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CITATIONS TO OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

In chronological order, the opinions in the courts below appear as follows: Caulfield v. Board of Education (Caulfield I), 449 F. Supp. 1203 (E.D.N.Y. 1979); Caulfield v. Board of Education (Caulfield II), 583 F. 2d 605 (2nd Cir. 1978); Caulfield v. Board of Education (Caulfield III), 486 F. Supp. 862 (E.D.N.Y. 1979); Caulfield v. Board of Education (Caulfield IV), 632 F. 2d 999 (2nd Cir. 1980).

STATEMENT OF THE CASE

In November 1976, after conducting an extensive investigation[1] into New York City's teacher hiring practices, the Office for Civil Rights (OCR) of the U.S. Department of Health, Education and Welfare, found "that the New York City school system [was] in non-compliance with Title VI of the Civil Rights Act of 1964" with respect to its teacher appointment and assignment policies. (See November 9, 1976 report from then-OCR Director Martin Gerry to then-Board of

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1/ Respondents Ross and Coalition of Black Educators were among the complainants that filed an administrative complaint with OCR charging the Board of Education with racially discriminatory practices. These administrative complaints were among the factors that precipitated OCR's review of the Board's student and teacher assignment practices.

Education Chancellor Irving Anker; See Caulfield v. Board of Education(Caulfield III), 486 F. Supp. 862, 867 (E.D.N.Y. 1979).

Upon identification of racially discriminatory practices, OCR is obligated by statute (42 U.S.C. 2000d-1) and by regulation (45 C.F.R. 80.7(d); 45 C.F.R. 80.8(a)) to attempt to secure voluntary compliance with Title VI "by informal means [if] possible." 45 C.F.R. 80.7(d). OCR's pursuit of its statutory mandate was successful in this case. And on September 7, 1977, OCR and the New York City Board of Education entered into a voluntary compliance agreement,[2/] which sought to rectify the segregative and discriminatory practices with respect to the appointment and

2/ The parties to the agreement referred to it as a Memorandum of Understanding. Accordingly, that description of the agreement appears in this brief and throughout the record in this case.

assignment of New York City public school teachers. It is that voluntary compliance agreement which has been challenged in the instant lawsuit by petitioners.

OCR's findings, with regard to New York City's teacher hiring practices, were reinforced by a number of earlier investigations that reached similar conclusions. For example, many of OCR's findings substantiated earlier judgments reached by the New York City Commission on Human Rights.[3/] The Human Rights Commission had

3/ See "Conclusions and Recommendations of the New York City Commission on Human Rights" in Tractenberg, ed., Selection of Teachers and Supervisors in Urban School Systems--Hearings Before the New York City Commission on Human Rights (Agathan: 1972), Respondent Ross' Exhibit 107 at trial. (At trial, all exhibits preliminarily marked pursuant to the pre-trial order were deemed admitted subject to any objection that any party may have had. Those exhibits to which no objections were made were admitted without the court passing upon the exhibits. Accordingly, references to exhibits in this brief cannot strictly comply with the requirements of Rule 34.5).

concluded that the system by which professional personnel were licensed and hired by the New York City Board of Education discouraged minority teachers from applying for positions and discriminated against those that did apply. Caulfield v. Board of Education (Caulfield III), 486 F. Supp. 862, 893 (E.D.N.Y. 1979). The Commission recommended major reforms with respect to the Board of Education's hiring practices.

The recommendations of the New York City Commission on Human Rights were not new. Indeed, going back to 1951 at least seven studies of the Board's practices were undertaken by independent commissions, agencies and management-consulting firms. Each of these studies recommended either substantial reform or total abolition of New York City's teacher licensing procedures. As the District Court

below found, "a chief reason for this criticism has been that the procedures tended to discourage minority teachers from applying and to screen them out." Caulfield III, supra.

Prior to the OCR investigation, the Board's appointment practices were also criticized by the New York courts. And some significant self-criticism occurred within the Board of Education itself. Thus in In re Skipwith 14 Misc. 2d 325, 180 N.Y.S. 2d 852 (Dom. Rel. Ct. 1958), Judge Justine Wise Polier reviewed the Board of Education's teacher assignment practices and found the Board of Education guilty of discrimination with respect to such practices. Judge Polier noted that there was a "city-wide pattern of discrimination against [minority schools] as compared to [white schools]: A far

greater percentage of positions in the [minority] schools were not filled by regularly licensed teachers." Id at 867-68. The Court further concluded:

> "That the Board of Education is entirely responsible for the existing discrimination in teacher assignments, there is, in my opinion, not the slightest doubt. What the Board did was to let the teachers themselves establish the discriminatory process...Having put the power of assignment in the hands of teachers by default, as far as their choosing or not choosing to teach in [a minority] school...the Board is bound by the acts of its servants." (180 N.Y.S. 2d at 871, 872)

Despite specific remedial suggestions that were advanced by Judge Polier in 1958, some seven years later, the situation apparently remained uncorrected. For the Board, in a "Statement of Policy Excellence for the Schools in New York City" (April 28, 1965) (Defendant Board Exhibit 28), recognized the continuing need for

remediation. The Board announced:

> "In order to insure excellence of instruction in all schools, the talents of the staff must be spread so as to reach all schools. This requires a procedure for guaranteeing a fair share of experience and competence in every school. Since voluntary movement of the staff has not resulted in such equitable distribution, the Superintendent has been directed to prepare a plan for the assignment of experienced teachers to be put into effect in September 1966...." Caulfield III, supra at 890.

In 1966, however, a census of the racial distribution of teachers was undertaken which, according to the District Court, found a substantially disproportionate distribution of black teachers. The census report found that black teachers were concentrated in districts that had the highest percentage of black students; and districts with large white student populations were

found to have virtually no black teachers. The census report recommended aggressive Board of Education action in an effort to integrate the teaching staffs. Ibid.

There is no evidence that any firm integration effort was ever undertaken. And, in this regard, Judge Weinstein was forced to observe, in the District Court below, that "as far as can be determined from the record, no steps which would have involved compulsory transfer of teachers either to improve experience or racial distribution was ever implemented." Ibid.

Thus OCR's investigation[4/] had been preceded by a long history of criticism and

4/ The investigation was explicitly based upon OCR's concern about the effect that discriminatory teacher hiring and assignment practices had upon minority school children. Caulfield v. Board of Education [Caulfield IV], 632 F. 2d 999, 1005 (2nd Cir. 1980).

concern with New York City's teacher hiring practices. Those concerns had lead to a series of administrative and judicial findings of discrimination regarding those practices. OCR's investigation reconfirmed these earlier concerns and findings. In the November 9, 1976 report issued by OCR Director Martin Gerry, the federal agency concluded that the Board of Education was excluding minority school teachers from the school system and segregating the relatively few teachers that were hired. Thus OCR found that Title VI had been violated inasmuch as the Board of Education had

> "...assigned teachers... in a manner that has created, confirmed and reinforced the racially and/or ethnic identifiability of the system's schools; and assigned teachers with less experience, lower average salaries and fewer advanced degrees to schools which have higher percentages of minority students."
> Caulfield III, supra at 867.

In response to the November 1976 findings by OCR, the Board of Education replied by formal letter of April 22, 1977 denying any intention to discriminate but offering to rectify certain practices. After reviewing its findings and the Board's April 22 response, OCR confirmed its findings in a letter and memorandum to the Board, dated July 6, 1977. Caulfield III, supra at 868.

The Board's formal letter of April 22, 1977 to OCR was not its only response to the allegations made in the November 1976 OCR report. Shortly after receipt of the OCR report, the Deputy Chancellor of the Board of Education, Bernard Gifford, was asked by Chancellor Anker to serve as chairman of an internal committee to review and evaluate OCR's specific findings. Accordingly, Deputy Chancellor Gifford undertook, on behalf of the Board of Education, a self-searching, six month review of the Board's

hiring and assignment practices. The Gifford study confirmed the conclusions of OCR in every material respect. See Office of the Deputy Chancellor, Race, Ethnicity, and Equal Employment Opportunity: An Investigation of Access to Employment and Assignment of Professional Personnel in New York City's Public Schools (N.Y.C. Board of Education, June 1977) Caulfield III, supra at 867-868.[5/]

Thus, by August 1977 both OCR and the Office of the Deputy Chancellor of the Board of Education had apparently concurred in their identification of Board policies and practices that were resulting in the substantial exclusion of minority teachers from

5/ Among the statistics examined by the Deputy Chancellor was the following remarkable set of comparative figures. The percentage of minority teachers in the Los Angeles school system for the 1974-1975 academic year was 31.1%, in the Chicago school system it was 43.2%, in Philadelphia it was 40.2% and in Detroit it was 50.6%. In the New York City school system the percentage of minority teachers was 13.2%. See Gifford Report at p. 4.

the school system as a whole and that were causing the relatively few minority teachers who were employed to be segregated in "minority" schools. A September 1977 agreement between OCR and the Board of Education sought to reform those policies and practices. It called upon the Board of Education to undertake efforts to eliminate the substantial exclusion of minority teachers from the school system as a whole and to desegregate minority personnel within the entire system.

With respect to policies and practices that had resulted in a segregated faculty, the agreement called for measures to insure that by September 1979 "the teacher corps of each District will reflect, within a range of five percent, the racial-ethnic composition of the teacher corps as a whole for each educational level and category, subject only to educationally based program

exceptions." (¶2 of the Memorandum of Understanding.) Similar goals were to be achieved within each individual school by September 1980. Caulfield III, supra at 868.

With respect to practices that had resulted in the substantial exclusion of minority teachers from the school system, the agreement contemplated a variety of affirmative action devices such as minority recruitment and it also called upon the Board of Education to support state legislation that would abolish the use of rank-order examination lists and that would require that the licensing examinations be properly "validated" and "job-related" before they could be used. (See ¶4 of the Memorandum of Understanding) Caulfield III, supra. The agreement also contemplated a set of goals and timetables with respect to the employment of minority teachers. The

goals were to be established on the basis of a labor pool analysis that was to be undertaken in the future. (See Memorandum of Understanding, ¶6). Caulfield III, supra at 869. And the Board further committed that, "[t]hrough the adoption and implementation of the affirmative action procedures and legislation...the Board commits that by September of 1980, the levels of minority participation in the teaching and supervisory service will be within a range representative of the racial and ethnic composition of the relevant labor pool." (See Memorandum of Understanding, ¶6) Ibid.

In October 1977 petitioners filed suit in the United States District Court, Eastern District of New York, challenging the legality of the Memorandum of Understanding. Petitioners argued that under §604 of the Civil Rights Act, 42 U.S.C. §2000d-3, OCR was without authority to inquire into the

Board's teacher appointment practices. Petitioners also asserted that the Board of Education had not violated Title VI of the 1964 Civil Rights Act and that, therefore, the attempt to remedy that perceived violation pursuant to the September 1977 compliance agreement represented unconstitutional "reverse discrimination."

In a claim not necessarily related to the legality of the Memorandum of Understanding the petitioners also sought to enjoin the collection of ethnic data for the annual civil rights surveys which the Board of Education undertakes on its own behalf and on behalf of the State of New York and the federal government.

In an order entered on February 23, 1978, petitioners' application for a preliminary injunction with respect to the collection of ethnic data was denied by District Judge Jack B. Weinstein. In March,

1978, the District Court expressed the view that constitutional due process rights had been violated by the failure of OCR and the Board of Education to afford other persons who may have been affected by the Memorandum of Understanding, to fully participate in the administrative proceedings that led to the execution of the September 1977 agreement. Accordingly, the District Court, entered summary judgment, sua sponte, which judgment vacated the Memorandum of Understanding and remanded the entire dispute to the Department of Health, Education and Welfare with directions that public hearings be held. Caulfield v. Board of Education (Caulfield I), 449 F. Supp. 1203 (E.D.N.Y. 1979).

In September 1978, the Court of Appeals ruled that District Court had not erred in denying plaintiffs' motion for a preliminary injunction regarding the collection of ethnic

data. In the same opinion the appellate court reversed Judge Weinstein's decision to vacate the Memorandum of Understanding. Caulfield v. Board of Education (Caulfield II), 583 F. 2d 605 (2nd Cir. 1978).

During the spring of 1979 an extensive bench trial was conducted by Judge Weinstein, at the conclusion of which the District Court rejected all the claims advanced by the plaintiffs and intervenor-plaintiffs. Caulfield v. Board of Education (Caulfield III), 486 F. Supp. 862 (E.D.N.Y. 1979). On appeal, the Court of Appeals affirmed the judgment of the District Court. Caulfield v. Board of Education (Caulfield IV), 632 F. 2d 999 (2nd Cir. 1980).

SUMMARY OF ARGUMENT

The questions presented for review by the petitioners are without legal merit and assume facts that are plainly at odds with the record in this case. Petitioners claim that Section 604 of the 1964 Civil Rights Act bars OCR from inquiring into New York City's teacher assignment and appointment practices. This claim is inconsistent with the decision of this Court and of every Circuit Court that has considered the matter. It is also inconsistent with the findings reached by the District Court below to the effect that systemic, racially discriminatory employment practices regarding New York City's teachers were resulting in discrimination against New York's City's school children. Moreover, petitioners reliance upon Section 604 rests upon

the factual proposition that "a primary objective of the federal financial assistance [to the New York City school system] is not to provide employment." Yet, if any conclusion can be drawn from the evidence introduced in this case, it is that a primary purpose of the federal funding, at issue here, is devoted to employment. Thus petitioners' claim that Section 604 bars OCR from reviewing and rectifying New York City's segregative and discriminatory hiring practices is without legal merit, and in any event, cannot be advanced on the factual record in this case.

Petitioners are similarly foreclosed by the instant record from characterizing this case as one involving the implementation of race-conscious remedies in the absence of prior findings of discriminatory practices.

Findings reached by OCR, by the New York City Commission on Human Rights, by a state court, and by several other agencies, confirmed the conclusion that the Board of Education was engaged in racially discriminatory practices in violation of Title VI as well as the Fourteenth Amendment. These findings were arrived at prior to the conclusion of the Memorandum of Understanding at issue here.

Petitioners objection to the collection of ethnic data is unsupported by any decision of this Court or any Circuit Court. Moreover, petitioners claim, in this regard, was factually undeveloped at trial. Therefore, the record in this case does not permit a serious evaluation of the constitutional claims advanced by petitioners with respect to the collection of ethnic data.

REASONS WHY THE WRIT SHOULD BE DENIED

THIS CASE PRESENTS NO ISSUE OVER WHICH THE COURT SHOULD EXTEND ITS DISCRETIONARY REVIEW. THE CLAIMS THAT PETITIONERS ADVANCE TO THIS COURT ARE, IN VARIOUS RESPECTS, UNSUPPORTED BY THE FACTUAL RECORD IN THIS CASE AND WITHOUT MERIT.

A. Petitioners Suggestion That OCR Was Barred By Section 604 Of The 1964 Civil Rights Act From Inquiring Into New York City's Teacher Assignment And Appointment Practices Is Unsupported By The Factual Record And Utterly Without Merit.

Petitioners claim that Title VI enforcement procedures are inapplicable with regard to the Board of Education's teacher assignment and appointment practices. In this regard, petitioners claim that under Section 604 of the Civil Rights Act, employment practices are exempt from Title VI coverage "except where a primary objective of the Federal financial assistance [to the employer] is to provide employment."

42 U.S.C. 2000d-3.

In a variety of contexts, petitioners have repeatedly advanced this claim to the courts below. On three occasions the lower courts have addressed this issue and in all three instances petitioners' assertions, in this regard, were firmly rejected. See Caulfield II, supra at 610-611; Caulfield III, supra at 878-882; Caulfield IV, supra at 1005.

The position taken by the courts below is eminently correct for several reasons: First, systemic, racially segregative and discriminatory practices with respect to the appointment and assignment of teachers have been consistently regarded by this Court, as well as the lower federal courts, as a form of discrimination against students. Thus, in Rogers v. Paul, 382 U.S. 198, 200 (1965), this Court held that allocation of

faculty on a racial basis "denies [students] equality of educational opportunity without regard to segregation of pupils." In Columbus Board of Education v. Pennick 443 U.S. 449, 467 (1979) this Court adopted the Sixth Circuit's conclusion that teacher segregation "deprive[s] black students of opportunities for contact and learning from white teachers and conversely...deprive[s] white students of similar opportunities to meet, know and learn from black teachers."

Accordingly, in United States v. Jefferson County Board of Education, 372 F. 2d 836, 883 (5th Cir. 1966) cert. denied sub. nom. Caddo Parish School Board v. United States 389 U.S. 840 (1967), the Fifth Circuit extensively considered the precise issue involving the scope of Section 604 and declared:

> "The defendants contend that this section bars any action requiring desegregation of faculties and school personnel....

> § 604 was never intended as a limitation of desegregation of schools. If the defendants' view of §604 were correct, the purposes of the statute would be frustrated, for one of the keys to desegregation is integration of faculty. As long as a school has a Negro faculty, it will always have a Negro student body." 372 F. 2d at 882-83.

The Fifth Circuit concluded that Section 604 "was not intended as a statutory bar to faculty integration in schools receiving federal aid." Id at 882. See also Otero v. Mesa County Valley School District, 568 F. 2d 1312, 1314 (10th Cir. 1977). In the face of decisions in this Court as well as the Second, Fifth, Sixth and Tenth Circuits supporting this view, petitioners have cited no cases to the contrary.

The legal proposition advanced by the Fifth Circuit in the Jefferson County case is reinforced by the particular factual record in this case. At the trial systemic,

racially discriminatory employment practices regarding New York City's teachers were shown, as a factual matter, to result in discrimination against students (See testimony of Dr. Kenneth Clark, Trial Transcript at 1798-1799, 1804-1805, 1836, 1839-1841) and the District Court below reached extensive findings with respect to this matter. Where, as here, strong evidentiary support is provided for the proposition that a segregated faculty is causing discrimination against students, Section 604 cannot be said to bar the federal supervisory agency, OCR, from reviewing and rectifying such discriminatory practices. Caulfield III, supra at 880-882.

Yet another reason for supporting the position taken by the courts below with respect to this issue turns upon a somewhat different factual ingredient in this case.

Petitioners alleged in their complaint and claim now that a primary purpose of the federal funding to the New York City Board of Education was not to provide employment. Yet, remarkably, at the extensive trial conducted below, petitioners introduced no evidence on this issue. Intervenor-plaintiffs did introduce certain limited documents[6/] with respect to this matter. But, from the

6/ Those documents (intervenor-plaintiffs' exhibits 212 and 213, at trial) contain New York City Board of Education resolutions accepting federal funds for the fiscal year of 6/76-6/77 as well as an index to those resolutions. An examination of those documents reveals that approximately four of the resolutions also include specific budgets indicating the purposes to which funding is to be put. Of the four specific budgets that are set forth in intervenor-plaintiffs' exhibit 213, employment costs (including salary and fringe benefits) ranged from 69% to 94% of the entire program costs. The majority of remaining pertinent budgetary resolutions simply detail the staff which the federal funding would support, but they fail to provide specific budgets. But even these more general funding resolutions seem to be predominantly used to cover employment costs. That this should be the case is unsurprising in light of the fact that it is well recognized that education is a highly labor-intensive field.

documents introduced by the intervenor-plaintiffs it is possible only to surmise that the purpose to which between 69 and 94 percent of the federal funding is put, is employment. It is thus the case, that if any conclusion can be drawn from the evidence introduced by the intervenor-plaintiffs, it is that a primary purpose of the federal funding, in issue here, is devoted to employment.

In sum, petitioners' claim that Section 604 bars OCR from reviewing and rectifying New York City's discriminatory teacher assignment and appointment practices is without merit, as a matter of law; and, in any event, cannot be advanced upon the factual record in this case.

B. Petitioners Are Foreclosed By The Record In This Case From Characterizing This Case As One Involving The Implementation Of Race-Conscious Remedies In The Absence Of Prior Findings Of Discriminatory Practices.

Petitioners second question is premised upon the factual assumption that the Memorandum of Understanding was not preceded by a finding that the Board of Education had engaged in discriminatory practices in violation of Title VI and the Fourteenth Amendment.[7] That factual assumption is simply inconsistent with the record at bar.[8]

7/ Petitioners second question begins "In the absence of a finding that the Board intentionally discriminated racially against black and Hispanic teachers...."

8/ In an expression of dicta in the Caulfield IV opinion, two of the judges in the Second Circuit panel below appear to share the view that the Memorandum was not preceded by a finding that the Board of Education had engaged in racially discriminatory practices. Caulfield IV, supra at 1006. That view cannot be correct. For as discussed above, it is inconsistent with the facts adduced at trial and with many of the findings reached by the trial court.

In this case, OCR, an administrative agency with the authority, indeed, the responsibility, to investigate racially discriminatory practices affecting New York City's school children, undertook such an investigation. During the course of this investigation, it identified racially discriminatory practices and recited its findings in an extensive report which it sent to the Board of Education in November 1976. And, pursuant to its statutory obligation to seek voluntary compliance with the Civil Rights Act (See 42 U.S.C. 2000d-2), OCR fashioned reasonable remedies in a voluntary effort to rectify the discrimination. Thus, OCR did everything within its administrative authority, consistent with the salutary goals of the Title VI voluntary compliance provisions, to render specific findings as to the Board of Education's discriminatory practices.

Moreover, an examination of the specific findings contained in the November 9, 1976 OCR report and an explanation of those findings provided by the author of the report, Mr. Martin Gerry (See Trial Transcript at pp. 778-779), reveals that the discriminatory practices identified by OCR were violative not only of Title VI but of the equal protection clause of the Fourteenth Amendment.

Indeed, the District Court, after an extensive review of the evidence in this case, concluded that "there was a reasonable belief on the part of the Board and OCR that the Board's hiring and assignment practices were in violation of Title VI... and the Constitution ....[And] these conclusions follow, whether the standard for establishing a violation of Title VI... is an 'effects' standard, or the Fourteenth Amendment 'intent' standard." Caulfield III,

supra at 924.

As discussed above, in the statement of the case, the Memorandum of Understanding was not only preceded by OCR's identification of racially discriminatory practices. Judge Weinstein found in the trial court (Caulfield III, supra at 888-889) and Judge Oakes noted in the Court of Appeals opinion (Caulfield IV, supra at 1005) that the voluntary compliance agreement was also preceded by New York state court findings with regard to New York City's teacher assignment practices and patterns. The judicial findings concluded that the assignment practices and patterns were racially discriminatory. See In re Skipwith, 14 Misc. 2d 325, 180 N.Y.S. 2d 852 (Dom. Rel. Ct. 1958). And, as Judge Weinstein found, those patterns had remained largely uncorrected prior to the conclusion of the

Memorandum of Understanding, Caulfield III at 889.

Moreover, as the District Court also noted, the New York City Commission on Human Rights had, in 1970, conducted extensive hearings with respect to New York City's teacher hiring procedures. Caulfield III, supra at 892. The City Commission had also found those procedures discriminatory. Ibid. And finally Judge Weinstein indicated that since 1951 virtually every commission, agency and consulting firm reviewing the system, pursuant to which New York City teachers were hired, has called for substantial reform or abolition of the system. "A chief reason for this criticism has been that the system tended to discourage minority teachers from applying and to screen them out." Caulfield III, supra at 893.

In sum, these conclusions by the District

Court, with regard to the investigations and findings of OCR, of the Skipwith Court, of the City Commission on Human Rights, and of other agencies and consulting firms, all amply supported by the record in this case, foreclose petitioners present attempt to characterize this case as one involving the implementation of race-conscious remedies in the absence of prior findings of discriminatory practices. In this case, the Memorandum of Understanding was repeatedly preceded by findings to the effect that the Board of Education's teacher hiring and assignment practices were racially discriminatory.

C. Petitioners Objection To The Collection Of Ethnic Data Is Without Merit. Moreover, Petitioners Claim, In This Regard, Was Factually Undeveloped At Trial.

1. Petitioners objection to the collection of ethnic data is without merit.

Federal regulations, enacted pursuant to Title VI and Title VII of the 1964 Civil Rights Act mandate the collection of ethnic data. See 29 C.F.R. 1602.30-1602.37; 28 C.F.R. 42.406 (a); 45 C.F.R. 80.6(b); 45 C.F.R. 80.6(c). It is, of course, well settled that these agency regulations, promulgated to effectuate the important goals of Title VI and Title VII, are "entitled to great weight." Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972); Griggs v. Duke Power Co. 401 U.S. 424, 433-434 (1971); Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

The collection of ethnic data represents a reasonable, indeed a necessary, procedure to assure the accomplishment of the purposes of Title VI and Title VII. Accordingly, in United States v. New Hampshire, 539 F. 2d 277 (1st Cir. 1976) Chief Judge McEntree wrote for a unanimous court in declaring:

> "The information which the regulations require a state to furnish on the EEO-4 form is essentially raw statistical data which, properly interpreted, can provide an intelligent basis for determining whether the state may be guilty of an unlawful employment practice within the purview of Title VII. [citations omitted] Information like that which the EEO-4 form seeks to accumulate is often highly useful when an agency or court attempts to make the often difficult inference that illegal discrimination is or is not present in a particular factual context....We have no doubt but that the information sought on the EEO-4 form is both reasonable and fully consistent with the overall purpose of Title VII." Ibid. at 279-280.

In the New Hampshire case, the state had argued, as petitioners here have contended, that the collection of ethnic data should not be required "because the information gleaned from the EEO-4 reports might be misused in a relief program improperly relying on quotes or in a program violative of §703(j) of Title

VII...." (Ibid. at 280.) The First Circuit unequivocally rejected this contention.

The Second Circuit has also quite firmly expressed the view that "the Constitution... does not condemn the collection of ethnic data." Caulfield II, supra at 611. The Caulfield II Court dismissed petitioners claims thusly: "The one-sentence argument that the census produces a Fourth Amendment violation is frivolous; there is no search or seizure here involved. Nor is there a violation of the constitutional right of privacy of teachers and principals...." Caulfield II, supra at 612.

Petitioners claim, in this regard, is plainly without merit. Indeed, petitioners have not identified any cases which suggest that there can be an arguable question about the matter.

2. Moreover, petitioners claim with regard to the collection of ethnic data was factually undeveloped at trial.

In denying petitioners request for preliminary injunctive relief with regard to the collection of ethnic data, the Court of Appeals in Caulfield II noted, somewhat critically, that petitioners had "neither presented nor sought to present any evidence in support of their motion for a preliminary injunction." Caulfield II, supra at 610.

The constitutional right of privacy can only be evaluated in a particular factual context. Thus if petitioners' constitutional claim, with respect to the collection of ethnic data, had been seriously pursued it would have been vital to present evidence as to how the ethnic data was collected,

how it is retained, and how it is used. Evidence with respect to expectations of privacy and how, if at all, persons were injured by the collection, maintenance or use of ethnic data are also essential to the proper evaluation of this claim. Yet, petitioners presented virtually no evidence with regard to this matter either in conjunction with their motion for preliminary injunctive relief or at trial.[9/]

In sum, though petitioners alleged in the complaint that the collection of ethnic data violated constitutional rights of privacy and though petitioners press

9/ For example, in the petition to this Court, plaintiffs rely upon Gibson v. Florida Legislative Committee, 372 U.S. 539, 546 (1962) to advance the claim that the collection of ethnic data infringes constitutional rights of privacy. Yet plaintiffs presented no evidence at trial, suggesting that the collection of data chilled or impeded the political associations of any individual.

that claim here, this issue remained factually undeveloped at trial. Accordingly, the record in this case does not permit a serious evaluation of the constitutional claims advanced by petitioners with respect to the collection of ethnic data.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari, in the above-styled matter, should be denied.

Respectfully submitted,

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